

Feb 06, 2020

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALFREDO CRUZ ESQUIVEL, as an
individual; and DONALD DAVID
WILLARD, as an individual,
Plaintiffs,
v.

THE UNITED STATES OF
AMERICA, acting through its agent
BUREAU OF LAND
MANAGEMENT; ARMANDO
FONSECA, an individual, in both his
personal and representative capacities;
and TOM DOE, a BUREAU OF
LAND MANAGEMENT
EMPLOYEE OR CONTRACTOR, in
both his personal and representative
capacities,
Defendants.

No. 2:18-cv-00148-SAB

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

The Court held a hearing in the above-captioned matter on January 8, 2020. During the hearing, the Court heard oral arguments in support of and in

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS * 1

1 opposition to the Government’s Motion to Dismiss for lack of subject-matter
2 jurisdiction, ECF No. 31. The Government argues that this Court lacks subject-
3 matter jurisdiction over Plaintiffs’ Federal Tort Claims Act (FTCA) claims
4 because they fall within the discretionary function exception to the FTCA’s
5 limited waiver of sovereign immunity. The Court took the matter under
6 advisement. Having considered the parties’ briefing, oral arguments, and the
7 relevant caselaw, the Court finds that it lacks subject-matter jurisdiction over
8 Plaintiffs’ FTCA claims and accordingly **grants** the Government’s motion to
9 dismiss those claims.

10 **FACTS**

11 This case arises from the decisions Defendants allegedly made in fighting
12 the North Star Fire in August 2015. The North Star Fire began burning on August
13 13, 2015, and ultimately burned more than 217,000 acres on the Colville Indian
14 Reservation, Colville National Forest, and Okanogan and Ferry counties. At the
15 times relevant to the case at hand, the North Star Fire was under the jurisdiction
16 of a Type 2 Incident Management Team (“IMT”) convened by the U.S. Forest
17 Service.

18 The IMT was governed by the United States Forest Service Manual (FSM).
19 ECF No. 35 at ¶ 4. The FSM provides high-level policy considerations rather than
20 formulaic rules to guide federal firefighting teams. *See* ECF No. 35-1. These
21 considerations include firefighter safety, public safety, ecological impacts,
22 resource allocation, and cost. *Id.* Specifically, the FSM “recognizes that the nature
23 of the wildland fire environment is often dynamic, chaotic, and unpredictable. In
24 such environments, reasonable discretion in decision-making may be required.”
25 ECF No. 35-1 at 19. In addition, the FSM notes that firefighters “must use their
26 best judgment in applying the guidance contained in [the FSM] to real-life
27 situations.” ECF No. 35-1 at 14.

1 On or about August 22, 2015, the IMT dispatched a team of structure
2 protection firefighters to Plaintiffs' property. The team was led by Thomas
3 McKibbin, an experienced firefighter with the Bureau of Land Management
4 (BLM). The team was instructed to assess the potential threat the North Star Fire
5 posed to Plaintiffs' property and to take defensive measure to protect structures
6 on the property. ECF No. 37 at ¶ 6. Mr. McKibbin determined that the wildfire—
7 which had not yet reached the property—was burning a type of fuel conducive to
8 high fire activity and that the weather conditions and topography of Plaintiffs'
9 property further increased the risk of extreme fire activity. ECF No. 37 at ¶ 7. Mr.
10 McKibbin concluded that the structures on Plaintiffs' property were at risk and
11 initiated fire defensive measures. Mr. McKibbin directed the team to improve a
12 dirt road on Plaintiffs' property into a fire break, and then instructed them to
13 reinforce the break with a burnout.¹ *Id.* at ¶ 8.

14 As Mr. McKibbin and his team were preparing to protect Plaintiffs'
15 property, Plaintiff Donald Willard approached the team and asked what they were
16 doing on his property. ECF No. 31 at 8; ECF No. 41 at ¶¶ 3-6. Mr. McKibbin told
17 Mr. Willard what defensive measures the crew was taking to protect Plaintiffs'
18 property from the fire and reassured Mr. Willard that, despite his beliefs to the
19 contrary, the crew's entire purpose was to protect private structures. ECF No. 33
20 at ¶ 74. However, Mr. Willard alleges that Mr. McKibbin specifically told him
21 not to worry about his property because the team would spray "foam" around the
22 area so that the burnout would not spread and that this promise convinced Mr.

23 ¹ A "burnout" is a low-intensity intentional burn of combustible materials
24 conducted under controlled conditions for the purpose of depriving an advancing
25 fire of additional fuel by widening and reinforcing fire breaks. ECF No. 37 at 8.
26 Plaintiffs characterize the fire as a "backburn", which is a more intense fire set to
27 change the direction and force of an oncoming fire. ECF No. 44 at 5; ECF No. 33
28 at ¶¶ 73-75. However, the facts indicate that fire set by Defendants' team was, in
fact, a burnout rather than a backburn and that Plaintiffs used the incorrect term to
describe the fire.

1 Willard to allow the crew to work and to leave his property for the night. ECF No.
2 41 at ¶¶ 12-16. Mr. McKibbin insists that he made no such promises, particularly
3 because foam would not be used in combination with a burnout. ECF No. 46 at ¶
4 4. Mr. McKibbin and his team did not take any defensive measures until Mr.
5 Willard consented to the burnout. *Id.* at ¶ 5. Mr. McKibbin and his crew worked
6 throughout the day and into the night, secured the firebreak—ensuring that any
7 residual fire was not a threat—and left to sleep, eat, and debrief with their
8 commanders. *Id.* at ¶ 8.

9 The next morning, Mr. Willard alleges that he arrived at the property to
10 find the team had left and immediately smelled propane coming from his
11 motorhome. Mr. Willard says he did not secure the gas to his home before leaving
12 the prior day because he thought the BLM crew would protect his home from the
13 fire. ECF No. 41 at ¶¶ 23-27. While Mr. Willard repaired the leak, he heard fire
14 crackling from up the hill, near where the BLM crew had been stationed the day
15 before. Mr. Willard noticed that no members of the crew were monitoring the fire,
16 no foam had been sprayed, and he could see no other precautions had been taken
17 to prevent the fire. *Id.* at ¶¶ 34-35. Plaintiffs allege that Mr. Willard fought the
18 fire on the property singlehandedly from 8 A.M. until 1:10 P.M., when Mr.
19 McKibbin and his crew arrived. *Id.* at ¶¶ 39-41.

20 Shortly after arriving at the property, Defendants allege that Mr. Willard
21 approached Mr. McKibbin. The nature of this conversation is disputed; Mr.
22 Willard maintains that he was respectful, though frustrated and concerned, ECF
23 No. 43 at ¶ 59, and Mr. McKibbin maintains that Mr. Willard was “aggressive”
24 and acting in a “bizarre” manner. ECF No. 37 at ¶¶ 14-16. After relaying the
25 incident to IMT Operations Chief Paul Delmerico, Mr. McKibbin and his crew
26 were instructed to vacate Plaintiffs’ property and were gone by 1:45 that
27 afternoon. *Id.* at ¶¶ 17-21; ECF No. 43 at ¶ 50. Mr. Willard asserts that Mr.
28 McKibbin left without answering his questions about why foam was not sprayed

1 or why the burnout had been left unsupervised overnight. ECF No. 43 at ¶ 49.
2 Plaintiffs allege that, had the Defendants been not intentionally misrepresented
3 the protective measures the firefighting crew was going to take, Mr. Willard
4 would have stayed on his property and would have taken more precautions to
5 protect it. ECF No. 43 at ¶¶ 47-48. Defendants maintain that they did not
6 misrepresent the protective measures they would take.

7 PROCEDURAL HISTORY

8 On May 15, 2017, Plaintiffs filed an FTCA administrative claim with the
9 BLM, seeking \$5 million in damages. ECF No. 19-2 at 23. At the administrative
10 level, Plaintiffs alleged that their damages resulted from BLM's negligent
11 fighting of the North Star Fire. *Id.* On November 13, 2017, BLM denied
12 Plaintiffs' claims on the basis that Plaintiffs failed to provide evidence of
13 negligence by a BLM employee and failed to provide evidence supporting their
14 damages claim. *Id.*

15 On May 11, 2018, Plaintiffs timely filed a Complaint in this Court, alleging
16 claims under the FTCA and the Civil Rights Act of 1871 against Secretary of the
17 Interior Ryan Zinke, BLM, BLM's Deputy Director of Policy and Programs Brian
18 Steed, BLM's Acting Deputy Director of Operations Michael Nedd, and two
19 BLM firefighters, Armando Fonseca and Tom Doe. ECF No. 1. The United States
20 maintains that they do not know the identities of the two individual defendants.

21 In this Complaint, Plaintiffs raised seven discrete causes of action: (1) § 22 1983; (2) federal and state takings claims; (3) tortious interference with a business
23 expectancy; (4) trespass/nuisance; (5) negligent firefighting; (6) injury to trees in
24 violation of RCW 64.12.030; and (7) unlawful damage to property. On July 11,
25 2018, BLM and its known employees filed a Rule 12(b)(1) motion to dismiss
26 Plaintiffs' takings and tortious interference claims for lack of jurisdiction under
27 the FTCA; Plaintiffs conceded and voluntarily dismissed these claims. *See* ECF
28 No. 11. On August 10, 2018, Secretary Zinke, Mr. Steed, and Mr. Need moved

1 for dismissal based on immunity under the FTCA. ECF No. 9. Plaintiffs
2 responded by requesting that Defendants stipulate to the filing of a First Amended
3 Complaint that provided for the removal of Secretary Zinke, Mr. Steed, and Mr.
4 Nedd, but preserved claims against the United States, Mr. Fonseca, and Mr. Doe.
5 ECF Nos. 18, 19.

6 Plaintiffs filed their First Amended Complaint (FAC) on December 17,
7 2018, alleging the following claims: (1) § 1983 claims against Mr. Fonseca and
8 Mr. Doe for violations of Plaintiffs' First, Fourth, Fifth, and Sixth Amendment
9 rights; (2) *Bivens* claims alleging violations of Plaintiffs' Fifth Amendment
10 substantive due process rights by Mr. Fonseca and Mr. Doe; (3)
11 Trespass/nuisance claims against Defendants for setting the burnout, failing to
12 supervise it, and allowing it to enter and damage Plaintiffs' property; (4)
13 Negligence, negligent supervision, and negligent hiring; and (5) Damage to land
14 and property in violation of Washington law. ECF No. 19 at 11-16.

15 Plaintiffs' FAC sought damages against all Defendants for property
16 damage, personal injury, timber trespass, emotional distress, punitive damages,
17 pre- and post-judgment interest, and reasonable costs and attorney's fees. *Id.* at 16.
18 After receiving several extensions, Defendants filed the instant motion and
19 request that the Court dismiss Plaintiffs' FTCA claims—the trespass/nuisance
20 and negligence claims—for lack of subject-matter jurisdiction.

21 **RULE 12(b)(1) STANDARD**

22 A federal court must have subject-matter jurisdiction in order to hear a case.
23 *Lightfoot v. Cendant Mortg. Corp.*, ___ U.S. ___, 137 S. Ct. 553, 560 (2017)
24 (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)). In the absence of jurisdiction,
25 Federal Rule of Civil Procedure 12(b)(1) provides that a party may move for the
26 dismissal of the case. There are two types of 12(b)(1) attacks: facial and factual.
27 In a facial attack, the challenger asserts that the allegations in the complaint are,
28 on their face, insufficient to invoke federal jurisdiction. *Safe Air for Everyone v.*

1 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In contrast, in a factual attack, the
2 challenger disputes the truth of the allegations that, by themselves, would
3 otherwise invoke federal jurisdiction by introducing affidavits or other evidence
4 showing that the court lacks subject-matter jurisdiction. *Id.* Once the moving
5 party has met its burden to convert the motion to dismiss into a factual attack, the
6 party opposing the motion must furnish its own affidavits or evidence to satisfy
7 its burden of establishing subject-matter jurisdiction. *Id.* In considering a factual
8 motion, the court need not presume the truthfulness of the plaintiff's allegations,
9 though it must resolve any factual disputes in the plaintiff's favor. *Edison v.*
10 *United States*, 822 F.3d 510, 517 (9th Cir. 2016).

11 In resolving a factual attack on jurisdiction, the district court may review
12 evidence beyond the complaint without converting the motion to dismiss into a
13 motion for summary judgment. *Robinson v. United States*, 586 F.3d 683, 685 (9th
14 Cir. 2009). However, a dismissal under 12(b)(1) is inappropriate if the motion is
15 based on genuinely disputed facts and the jurisdictional and substantive issues are
16 "so intertwined" that resolution of the jurisdictional question requires the court to
17 reach the merits of the plaintiff's claims. *Safe Air*, 373 F.3d at 1039 (quoting *Sun*
18 *Valley Gas, Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir. 1983)). If the
19 jurisdictional motion involves issues that go to the merits of the claim, the court
20 should instead apply a summary judgment standard and not reach the
21 jurisdictional question until a substantive motion is filed or the case proceeds to
22 trial. *Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014).

23 **SUBJECT-MATTER JURISDICTION UNDER THE FTCA**

24 In general, the United States is immune from suit unless it has waived its
25 sovereign immunity or otherwise consented to the suit. *F.D.I.C. v. Meyer*, 510
26 U.S. 471, 475 (1994). If sovereign immunity has not been waived, the court must
27 dismiss the case for lack of subject-matter jurisdiction. *Id.* The FTCA waives the
28 United States' sovereign immunity "under circumstances where the United States,

1 if a private person, would be liable to the claimant in accordance with the law of
2 the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). Thus, the
3 United States and its agents can be held liable in tort if a private person would
4 have been held liable for the relevant act or omission. *Jachetta v. United States*,
5 653 F.3d 898, 904 (9th Cir. 2011).

6 However, the FTCA’s waiver of sovereign immunity is limited by a
7 number of exceptions. Relevant here is the discretionary function exception
8 (DFE). The DFE preserves the United States’ sovereign immunity for “any
9 claim...based upon the exercise or performance or the failure to exercise or
10 perform a discretionary function or duty on the part of a federal agency or an
11 employee of the Government, whether or not the discretion involved be abused.”
12 28 U.S.C. § 2680(a). The DFE is designed to insulate government decisions from
13 “judicial second-guessing” and shields the United States from liability for the
14 actions of employees who acted according to their best judgment. *Gonzalez v.*
15 *United States*, 814 F.3d 1022, 1027 (9th Cir. 2016). This rule applies even if the
16 government employees acted negligently. *Kennewick Irr. Dist. v. United States*,
17 880 F.2d 1018, 1029 (9th Cir. 1989). The government bears the burden of
18 showing whether the exception applies. *Kim v. United States*, 940 F.3d 484, 487
19 (9th Cir. 2019).

20 Courts apply a two-part test to determine whether the DFE applies. First,
21 the court must decide whether the challenged action involves an element of
22 judgment or choice. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The
23 exception does not apply where a federal statute, policy, or regulation specifically
24 prescribes a course of action for the challenged conduct. *Id.*; *see also United*
25 *States v. Gaubert*, 499 U.S. 315, 324-25 (1991). Second, the court must determine
26 whether the challenged action “is of the kind that the discretionary function
27 exception was designed to shield.” *Berkovitz*, 486 U.S. at 536. The action is of the
28 kind that the exception was designed to shield if the conduct implements social,

1 economic, or political policy considerations. *Nurse v. United States*, 226 F.3d 996,
2 1001 (9th Cir. 2000). When a statute or regulation allows a federal agent to act
3 with discretion, there is a “strong presumption” that the authorized act is based on
4 an underlying policy decision. *Id.* (citing *Gaubert*, 499 U.S. at 324). Furthermore,
5 it is irrelevant whether the federal agent actually had policy considerations in
6 mind when she made the decision; rather, what matters is that a policy analysis
7 *could* have applied to the decision. *Gonzalez*, 814 F.3d at 1034.

8 Courts have had multiple opportunities to consider the applicability of the
9 DFE to negligence claims stemming from decisions made by government actors
10 while fighting wildfires. *See, e.g., Whisnant v. United States*, 400 F.3d 1177,
11 1182 n.3 (9th Cir. 2005); *Miller v. United States*, 163 F.3d 591, 595 (9th Cir.
12 1998). For example, in *Miller*, plaintiff landowners sued the United States,
13 alleging that the United States had negligently allowed fires on federal land to
14 burn their property when BLM firefighters decided it would be too risky to fight
15 the fires. *Miller*, 163 F.3d at 592. There, the Ninth Circuit held that its “task [was]
16 not to determine whether the Forest Service made the correct decision in its
17 allocation of resources” and found that the DFE applied to firefighters’ decisions
18 regarding how to fight a wildfire. *Miller*, 163 F.3d at 595. In reaching its
19 conclusion, the court relied on language in the FSM that granted firefighters
20 discretion to consider fire suppression costs, resource damage, environmental
21 impacts, and the risk to private property in making firefighting decisions. *Id.* at
22 596. The Ninth Circuit therefore concluded there that the DFE applied and that
23 the district court lacked jurisdiction over the plaintiffs’ negligence claims. *Id.* at
24 597.

25 Also informative is *Green v. United States*, 630 F.3d 1245 (9th Cir. 2011).
26 There, the plaintiffs sued alleging that the Forest Service was negligent for failing
27 to notify them that a backburn was set near their properties while firefighters
28 battled a wildfire in a national forest. *Id.* at 1247-48. The Ninth Circuit concluded

1 that, although the choice to set the backburn was discretionary, the decision to set
2 backburns without informing property owners of the burn or the risks involved
3 with a backburn in particular was not subject to policy considerations. *Id.* at
4 1251-52. Thus, the Ninth Circuit concluded that the DFE did not apply, and the
5 district court did have jurisdiction to hear the plaintiffs' negligence claims against
6 the United States. *Id.* at 1252.

7 DISCUSSION

8 The United States argues that this Court lacks subject-matter jurisdiction
9 over Plaintiffs' FTCA claims because the claims fall within the DFE to the
10 FTCA's waiver of sovereign immunity. In response, Plaintiffs make three
11 arguments: first, that the Court should not grant the motion because the
12 jurisdictional and substantive issues are too closely intertwined and should be
13 resolved either at trial or on a substantive motion; second, that Defendants lied to
14 Mr. Willard about the precautions the firefighters would take to protect their
15 property and that such a choice is neither discretionary nor grounded in public
16 policy; and third, that *Miller* is inapplicable where the federal agents—primarily
17 Mr. McKibbin and his crew—were negligent. For the reasons discussed herein,
18 the Court concludes that decisions related to fighting the North Star Fire—
19 including setting the burnout on Plaintiffs' property—fall within the DFE and
20 therefore the Court lacks jurisdiction to consider Plaintiffs' FTCA claims.

21 1. Whether the Jurisdictional and Substantive Issues are "Too Intertwined" to
22 Resolve on a 12(b)(1) Motion

23 The Court first considers Plaintiffs' argument that the Court should deny
24 the motion to dismiss because the jurisdictional question is too intertwined with
25 the substantive issue to decide on a motion to dismiss. Plaintiffs argue that the
26 Court should deny the motion and wait to reach the jurisdictional determination
27 until the Government brings a motion going to the merits or the matter goes to
28 trial. ECF No. 44 at 13. In particular, Plaintiffs maintain that the Court cannot

1 determine if the discretionary function applies unless it first decides whether Mr.
2 McKibbin was negligent, whether Mr. McKibbin had policy-making authority,
3 and whether the decision to set a burnout was a policy decision. ECF No. 44 at 13.
4 However, Plaintiffs also conceded that “the facts in this matter establish that the
5 DFE would likely apply to the BLM’s decision to conduct a [burnout]” because
6 the *Berkovitz* test is satisfied. *Id.* at 12.

7 Plaintiffs’ arguments involve misstatements and misinterpretations of the
8 relevant standards and, therefore, necessarily fail. The Court need not determine
9 whether Mr. McKibbin—or any of the Defendants, for that matter—were
10 negligent or were policymakers, or whether the decision to set the burnout was a
11 policy decision. The determination of whether the government and its agents were
12 negligent is irrelevant to analysis of whether the DFE applies. *Kennewick Irr.*
13 *Dist.*, 880 F.2d at 1029; *Young*, 769 F.3d at 1052-53. The Court’s inquiry here is
14 focused on whether the judgment was one of judgment or choice, not whether that
15 choice was proper. The Court need not make any factual determinations about
16 whether any of the Defendants were negligent in order to determine whether it
17 has jurisdiction over Plaintiffs’ FTCA claims.

18 Furthermore, Plaintiffs are incorrect in their assertion that the DFE applies
19 only if Mr. McKibbin had policy-making authority. This argument fails because
20 the DFE considers “the nature of the conduct, rather than the status of the actor”
21 in determining whether the exception applies. *Berkovitz*, 486 U.S. at 536.
22 Plaintiffs’ argument that the Court cannot reach the jurisdictional question until it
23 determines whether the decision to set the burnout was a policy decision similarly
24 fails. The Court must determine whether the decision made was within the scope
25 of discretion afforded the government agent and whether the decision is one
26 susceptible to policy analysis, not whether the government agent who made the
27 decision has authority to set government policy. Plaintiffs have incorrectly
28 conflated these two requirements.

1 The Court may weigh the evidence before it and make factual
2 determinations with regards to the applicability of the DFE in order to satisfy its
3 own duty to ensure that it has power to hear this case. *See, e.g., Roberts v.*
4 *Corrothers*, 812 F.2d 1173, 1177-78 (9th Cir. 1987); *Augustine v. United States*,
5 704 F.2d 1074, 1077 (9th Cir. 1983). Accordingly, the Court will proceed to
6 consider whether the DFE applies to Plaintiffs' FTCA claims and whether it is
7 deprived of jurisdiction over those claims.

8 2. The Discretionary Function Exception to the Federal Tort Claims Act

9 The Government argues that the DFE applies to Plaintiffs' FTCA claims
10 and the Court lacks jurisdiction over those claims. However, Plaintiffs do not
11 seriously dispute that the DFE applies. To the contrary, Plaintiffs concede that
12 "the facts in this matter establish that the DFE would likely apply" because the
13 *Berkovitz* test is satisfied. ECF No. 44 at 12. Plaintiffs argue that the DFE should
14 not apply because Plaintiffs were negligent in setting the burnout, lied to
15 Plaintiffs to induce their consent to the burnout, and that the decision to abandon
16 the burnout was not a permissible exercise of policy judgment. However,
17 Plaintiffs' arguments that these allegations preclude application of the DFE are
18 not correct statements of the law. For the reasons discussed herein, the Court
19 finds that the DFE applies to Plaintiffs' FTCA claims and therefore the Court
20 does not have jurisdiction over those claims.

21 a. *Step 1: Whether the Challenged Conduct Involves an Element of*
22 *Judgment or Choice*

23 The first step of the DFE inquiry requires the Government to determine
24 whether the challenged conduct involves an element of judgment or choice.
25 *Berkovitz*, 486 U.S. at 536. Here, Plaintiffs challenge the decisions made by Mr.
26 McKibbin and his team in fighting the North Star Fire, including the decision to
27 set a burnout on Plaintiffs' property. Defendants assert that Mr. McKibbin and his
28 crew were given discretion to exercise their best judgment in choosing how to

1 fight the fire and protect Plaintiffs' property by the United States Forest Service
2 Manual (FSM). In particular, Defendants point to guidance in the FSM that
3 allows firefighters to consider firefighter safety, public safety, ecological impacts,
4 and cost when deciding how to fight a fire. ECF No. 35 at 25.

5 The Ninth Circuit has recognized that the FSM gives firefighters broad
6 discretion to make decisions about how to fight wildfires and that the FSM
7 outlines "broader goals sought to be achieved [that] necessarily involve an
8 element of discretion." *Miller*, 163 F.3d at 595; *see also Woodward Stuckart, LLC*
9 *v. United States*, 973 F. Supp. 2d 1210, 1220 (D. Or. 2013); *Kimball v. United*
10 *States*, No. 1:12-cv-00108-EJL, 2014 WL 683702 (D. Idaho Feb. 20, 2014); *Juras*
11 *v. United States*, No. 11-cv-0155-WPL, 2011 WL 13223900 (D. N.M. Oct. 14,
12 2011). Indeed, the FSM explicitly acknowledges that "employees must use their
13 best judgment" and "reasonable discretion in decision-making" in applying the
14 guidance in the FSM to real-life fires. ECF No. 35 at 19.

15 Here, Mr. McKibbin decided to set a burnout because—based on his
16 experience and training—a burnout was the best way to reinforce the break
17 protecting Plaintiffs' property from the approaching wildfire. ECF No. 37 at
18 ¶ 7-8. This is exactly the sort of decision-making that involves an element of
19 judgment or discretion for purposes of the DFE. *See Miller*, 163 F.3d at 595;
20 *Green*, 630 F.3d at 1250-51. Plaintiffs do not earnestly dispute that this decision
21 involved an element of discretion or judgment; rather, Plaintiffs assert that
22 Defendants' alleged negligence does not involve an element of choice or
23 discretion. *See* ECF No. 44 at 14, 16. However, negligence is irrelevant to this
24 determination, as the DFE applies regardless of whether the government's
25 discretion is abused. *See* 28 U.S.C. § 2680(a). Accordingly, the Court concludes
26 that the first *Berkovitz* prong is satisfied.

27 //

28 //

b. *Step 2: Whether the Challenged Conduct Implements Social, Economic, or Political Considerations*

3 The Court must next determine whether the challenged conduct
4 implements policy considerations. The Court concludes that Defendants' decision
5 to set a burnout is a protected policy consideration. The FSM directs firefighters
6 to balance multiple considerations in deciding how to fight a wildfire, including
7 firefighter safety, environmental impact, resource damage, and suppression costs.
8 See ECF No. 35-1 at 25. Because the FSM explicitly provides firefighters
9 discretion in choosing how to fight a fire, it is presumed that the decision to set a
10 burnout here is susceptible to policy analysis. *Nurse*, 226 F.3d at 1001 (citing
11 *Gaubert*, 499 U.S. at 324).

12 Plaintiffs make three arguments as to why the decision at issue here is not
13 susceptible to policy analysis. None of these arguments convince the Court to
14 conclude that the decision challenged here is not susceptible to policy analysis.
15 First, Plaintiffs argue that Defendants' decisions are not susceptible to policy
16 analysis because the decisions involved negligence or abuse of discretion.
17 Plaintiffs' arguments must fail because the DFE applies regardless of negligence
18 or abuse. *See Kennewick*, 880 F.2d at 1029. Defendants' decision to set a burnout
19 on Plaintiffs' property is the sort of decision courts have repeatedly recognized as
20 one susceptible to policy considerations. *See, e.g.*, *Whisnant*, 400 F.3d at 1182 n.
21 3.

22 Second, Plaintiffs argue that Defendants' reliance on *Miller* is misplaced
23 because, according to Plaintiffs, *Miller* did not involve claims of negligence and
24 is therefore not applicable. ECF No. 44 at 17-18. Plaintiffs are mistaken on this
25 point. A review of the *Miller* opinion leads the Court to conclude that the
26 underlying complaint in *Miller* was grounded in negligence. There, the Ninth
27 Circuit cited the DFE as relevant exception to the FTCA's waiver of sovereign
28 immunity, and the DFE largely applies to claims of negligence. *See Miller*, 163

1 F.3d at 593 (citing 28 U.S.C. § 2680(a) (“any claim...based upon the exercise or
2 performance or the failure to exercise or perform a discretionary function or
3 duty...)). This conclusion is bolstered by a review of the appellate briefing in the
4 case, which explicitly shows that the plaintiffs in that case brought their claims
5 under a negligence theory. *See* Brief for Appellants at 2, *Miller v. United States*,
6 163 F.3d 591 (9th Cir. 1998) (No. 97-35847); Brief for Appellee at 3, *Miller v.*
7 *United States*, 163 F.3d 591 (9th Cir. 1998) (No. 97-35847). Accordingly,
8 Plaintiffs cannot in good faith argue that *Miller* does not apply simply because the
9 Ninth Circuit’s opinion does not use the word “negligence.”

10 Finally, Plaintiffs argue that Defendants’ choice to set a burnout is not
11 susceptible to policy analysis because there is no government policy that allows
12 the government or its agents to lie. This argument is grounded in Plaintiffs’
13 allegations that Mr. McKibbin lied to Mr. Willard about precautionary measures
14 his team would take in conducting the burnout and that Mr. McKibbin lied to
15 induce Mr. Willard’s consent to the burnout. *See* ECF No. 44 at 14. Defendants
16 strongly assert that Mr. McKibbin did not make any such promises, and that he
17 had no incentive to lie to Plaintiffs. *See* ECF No. 46 at ¶ 5. Even assuming that
18 Plaintiffs’ allegations are true, intentional torts such as misrepresentation are an
19 exception to the FTCA’s waiver of sovereign immunity and, as such, the Court
20 would not have jurisdiction over such a claim. *See* 28 U.S.C. § 2680(h);
21 *Schinmann v. United States*, 618 F. Supp. 1030, 1034-37 (E.D. Wash. 1985)
22 (misrepresentations are within § 2680(h) prohibition).

23 Accordingly, the Court concludes that Defendants’ decision to set a
24 burnout on Plaintiffs’ property because it is susceptible to a balancing of a myriad
25 of interests ranging from protecting private property to firefighter safety to cost
26 suppression. Plaintiffs’ attempts to distinguish this case from *Miller* and attempts
27 to argue that the decision at issue here is not susceptible to policy analysis fail. As
28

such, the decision to set a burnout here is the type of conduct that the DFE is designed to protect. *See Miller*, 163 F.3d at 596.

3. Jurisdictional Discovery

4 Plaintiffs make a last-ditch effort to avoid dismissal of their FTCA claims
5 by requesting that the Court allow them the opportunity to engage in
6 jurisdictional discovery. ECF No. 44 at 20-21. Plaintiffs argue that Defendants
7 alone were afforded the opportunity to engage in discovery on the issue of
8 jurisdiction. Defendants object to this request.

9 Plaintiffs are not entitled to further jurisdictional discovery. Plaintiffs were
10 given the same opportunity to engage in jurisdictional discovery as were
11 Defendants. *See* ECF No. 26 (limiting discovery by both parties to jurisdictional
12 issues). The fact that Plaintiffs failed to engage in jurisdictional discovery
13 pursuant to this Order while Defendants took full advantage of this opportunity to
14 investigate whether the Court had jurisdiction is not grounds to grant Plaintiffs
15 leave to conduct further discovery. This is particularly true where Plaintiffs bore
16 the burden of proving that jurisdiction existed in the first place. *See, e.g., Gager v.*
17 *United States*, 149 F.3d 918, 922 (9th Cir. 1998). Furthermore, Plaintiffs are not
18 entitled to additional jurisdictional discovery where it is unlikely that discovery
19 will produce facts sufficient to survive a 12(b)(1) motion. *Gonzalez*, 814 F.3d at
20 1031. As discussed above, it is unlikely that any facts exist that would make the
21 DFE inapplicable to Plaintiffs' claims. Thus, Plaintiffs' request for additional
22 discovery is denied.

CONCLUSION

24 The Court concludes that it lacks jurisdiction over Plaintiffs' FTCA claims
25 because the claims fall within the discretionary function exception to the FTCA's
26 waiver of sovereign immunity. First, the decision to set a burnout here was one
27 grounded in discretion or judgment. Defendants were granted authority to
28 exercise their discretion in choosing how to fight wildfires. Second, the decision

1 to set a burnout was susceptible to policy analysis because Defendants balanced
2 competing interests in deciding to set the burnout. Accordingly, because the
3 discretionary function exception applies, the Court lacks subject-matter
4 jurisdiction and dismisses Plaintiffs' FTCA claims.

5 **Accordingly, IT IS HEREBY ORDERED:**

6 1. The Government's 12(b)(1) Motion to Dismiss for Lack of Jurisdiction
7 under the Discretionary Function Exception to the FTCA, ECF No. 31, is
8 **GRANTED.**

9 2. The following of Plaintiffs' claims are **dismissed with prejudice**:

10 (a) Trespass/nuisance; and

11 (b) Negligence/Negligent Supervision/Negligent Hiring.

12 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
13 this Order and provide copies to counsel.

14 **DATED** this 6th day of February 2020.



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18 Stanley A. Bastian

19 Stanley A. Bastian
20 United States District Judge
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